BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinions below are referred to in the petition for writ of certiorari under this same caption.

JURISDICTION.

The statement as to jurisdiction is set forth in the petition for writ of certiorari.

STATEMENT OF THE CASE.

The facts upon which the questions presented arise have been stated in the "Summary Statement" thereon in the petition for writ of certiorari.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court, which found in favor of the defendant and denied the motion of petitioner for a verdict and judgment in his favor on his petition.

2. The Circuit Court of Appeals erred in not ordering judgment in favor of the plaintiff on his petition.

3. The Circuit Court of Appeals erred in affirming the Order of the District Court, which denied the mo-

tion of petitioner for a new trial for errors occurring at the trial and in not granting a new trial to the petitioner.

4. The Circuit Court of Appeals erred in affirming the Order of the District Court which denied the petitioner a new trial on account of newly discovered evidence and in not ordering a new trial on account thereof.

5. The Circuit Court of Appeals erred in not holding that the defense should be treated as a counterclaim in accordance with Rule 8(c) of Rules of Civil Procedure.

6. The Court of Appeals erred in permitting the defendant to introduce into evidence unverified documents and in denying to the petitioner his constitutional right to cross-examine with respect thereto and to offer affirmative evidence to disprove and impeach the allegations thereof.

ARGUMENT.

We have shown in the summary statement the most unusual situation in which a bank has been found guilty of an alleged fraud without the testimony of a single witness thereto and without the presentation of any sworn evidence, merely upon allegations contained in unverified documents. Further, many of the allegations upon which the finding of fraud necessarily rests were mere hearsay, opinions and conclusions contained in reports of Examiners made to the Comptroller, which the Examiner himself warned were nec-

essarily obtained from "informants" and that he was "not in a position to guarantee the accuracy of such part of the information as may not have been obtained at first-hand."

It is obvious that no Federal Judge would so far violate the fundamental requirements of the Fifth Amendment to the Constitution, without some alleged basis for permitting unsworn evidence, hearsay, conclusions and opinions to go before the jury. It is, therefore, important to consider the grounds upon which the District Court justified his admission of this evidence without according to the petitioner any right of cross-examination. The basis of the action of the trial Court was Section 661, Title 28, U. S. C. A., which provides:

> "Copies of any books, records, papers or documents in any of the executive departments authenticated under the seals of such departments shall be admitted in evidence equally with the originals thereof."

Further, Section 663, Title 12 U. S .C. A. reads:

> "Every certificate, assignment and conveyance executed by the Comptroller of the Currency in pursuance of law and sealed with his seal of office, shall be received in evidence in all places and courts. * * *"

These statutes do not define the probative effect of such documents. It was further claimed that under Rule 43 of the Federal Rules of Civil Procedure:

> "All evidence shall be admitted which is admissible under the Statutes of the United States,

> or under the rules of evidence heretofore applied in courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held."

Further, Section 1636 and 1637 of the Kentucky Statutes in force at the time of the trial of this case provide as follows:

> "Section 1636: All records and exemplifications of office books, kept in any public office of the United States * * * shall be evidence in this State if attested by the keeper of such records or books and the seal of his office, if there be a seal."

Section 1637:

> "Exemplifications from the books of the executive department of the United States or any papers filed therein shall be evidence when attested by the President or the chief of either of the departments; * * *"

These statutes were intended as a matter of convenience to authorize the production of authenticated copies instead of requiring the keeper or the maker of the originals to produce them in Court. Authentication was not and is not insisted upon in this case by the Receiver. He concedes that the papers produced were authentic copies of the originals, but he contends that the originals would not be competent proof in the present case of the hearsay conclusions and opinions contained therein.

The exception to the hearsay rule, which permits the introduction of official records, without calling the author thereof as a witness, is limited to official records and reports of primary facts and transactions in which the Government is directly concerned. (Moses v. United States (1897), 166 U. S. 571; Chesapeake & Delaware Canal Co. v. U. S. (1919), 250 U. S. 123; see also U. S. v. Bell (1884), 111 U. S. 477.

Defendant contended in the Court below that the Bank Examiners' reports were public records, because the same were made pursuant to law which requires examination of national banks twice each year by national bank examiners appointed by the Comptroller of the Currency. Section 481, Title 12, U. S. C., provides that:

> "The examiner making the examination of any national bank or of any other member bank shall have power to make a thorough examination of all of the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath, and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency."

In the present case, the Examiner did not administer the oaths referred to and in any event the portions of the Examiners' reports objected to do not relate to primary records of any facts. The primary facts would be contained in the books and records of the bank. The character of reports introduced in evidence in the present case are of an investigatory nature.

Reports of an investigation based on secondary evidence is never admissible under the alleged exception to the hearsay rule. Our position on this point is stated in 20 Amer. Jurisprudence, p. 866, Par. 1027, as follows:

> "According to the theory advanced by some courts, a record of a primary fact made by a public official in performance of official duty is, or may be made by legislation, competent *prima facie* evidence as to the existence of that fact, *but records of investigations and inquiries* conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects and involving the exercise of judgment and discretion, expressions of opinion, and the making of conclusions, *are not admissible in evidence as public records.*"

Incompetent evidence does not become competent because it is included in an official report. In United States v. Corwin, 129 U. S. 381 (1889), the Court, in discussing the introduction of official reports, said:

> "Manifestly the design and meaning of this rule is not to convert incompetent and irrelevant evidence into competent and relevant evidence simply because it is contained in an official communication. Had the officer been testifying under oath, such an assertion would have been excluded as inadmissible upon the ground that the statement itself implied the existence of primary and more original and explicit sources of information. * * * The Courts held this rule, which has been invoked, to be limited to only such statements in official documents as the officers are bound to make

> in the regular course of official duty. The statement of the extraneous or independent circumstances, however naturally they may be deemed to have a place in the narrative, is no proof of such circumstances, and is, therefore, rejected" (p. 386).

In accord, see Nagel v. U. S., 145 Fed. 302, C. C. A. 2 (1906); U. S. v. Case, 49 Fed. 270 (1892).

We do not contend that a national bank examiner's report is not admissible in so far as the same is competent and relevant when the examiner is called to the witness stand and qualified in the usual and customary way. The summary of the books contained in a national bank examiner's report is just as competent as the summary prepared by any expert accountant but the accountant, the books and papers must be available for cross-examination. This was specifically held in Jeffreys v. O'Neal, C. C. A. 4 (1933), 64 Fed. 2d 284, where the Court held

> "Report of experienced national bank examiners as to bank's condition, supported by testimony of examiner and by books and papers on which report was based is competent evidence."

The trial Judge in the instant case in admitting the Examiner's reports said:

> "Over my own opinion and idea, and controlled by what appears to be the *modern trend,* I shall permit the jury to consider the examiner's reports *in toto,* but shall advise the jury that there was no opportunity for cross-examination of the examiners. * * *" (R. 1202.)

We know of no such "modern trend." Professor Wigmore, on evidence, states:

> "It may be said that the tendency of the courts is to disprove, rather than to favor, the admission of such reports or inquisitions * * *." 1904 Edition, Vol. 3, Par. 1672, p. 2080.

However, no such alleged exception to the hearsay rule justifies the admission of excerpts from the report of an accountant (White) as to the Bank's earnings, and charged off loans and net addition to reserves from April 1, 1927, to December 31, 1929. The accountant who prepared this report was not a public officer. His tabulation was not an official report or record. He was employed by the Receiver in another case long after the Bank closed. Summaries of accountants are only admissible when the accountant is placed on the witness stand under oath and the books are available and he is subject to cross-examination. Morton, Butler Timber Co. v. U. S., 91 Fed. 2d 884 (1937). The defendant contended this evidence was admissible because it had been introduced in evidence by the Receiver in another case. But in that case White was called as a witness and was severely cross-examined to show that the exhibit was incorrect. (See Record No. 8852, Anderson v. Abbott, pp. 135, 136.)

The excuse for permitting the defendant to read into evidence numerous paragraphs from the Bill in Equity against the bank directors in Keyes, Receiver, v. Akers, was that the Receiver had relied upon the allegations of the Bill in his suit against the directors.

The Equity Bill was not verified and was signed by Receiver's counsel, not by the Receiver. Tway was not a party to the Directors' Suit. Under these circumstances, the unverified Bill of Complaint was incompetent to prove an admission or to constitute affirmative evidence of fraud. This is directly held in Delaware County Commissioners v. Diebold Safe & Lock Co. (1890), 133 U. S. 473, at 487:

> "The former complaint not under oath nor signed by plaintiff, but only by its attorneys, was clearly incompetent to prove an admission by the plaintiff that upon those facts it had not a cause of action against this defendant."

In accord are:

Combs v. Hodge (1858), 21 How. (62 U. S.) 397, at p. 404;
Fidelity & Casualty Company of New York v. The Brightman, 53 F. 2d 161 (C. C. A. 8, 1931);
Fidelity & Deposit Company of Maryland v. Redfield, 7 F. 2d 800 (C. C. A. 9, 1925).

Kentucky rulings also accord:

Rankin v. Maxwell, 2 A. K. Marshall, 9 Ky. 828;
Lane v. Bryant, 100 Ky. 138 (1896).

Professor Wigmore on evidence states that there grew up with the development of chancery pleading a marked distrust of a bill because the practice in drafting was such that the allegations were understood to be in large part mere "conventional rigamarole." He concludes "For these reasons the doctrine came to be settled that a bill in chancery was not receivable in

another suit as an admission." 1904 Edition, Vol. 2, 1065, p. 1243.

Assuming *arguendo* that the bill was admissible, it certainly was not irrefutable. The jury was entitled to know that many of the allegations made therein had not been sustained upon the final determination of the case by the Court. Therefore, we offered in evidence, as appears in the summary statement, the final opinions and decree of the Court in the Directors' Liability case. The trial Judge excluded the opinions and the final decree from the consideration of the jury and thereby made the Bill in Equity conclusive proof of the facts alleged therein. The Court assigned no reason for this ruling and we know of none that can justify it. Even statutes which create "conclusive" presumptions are held invalid. Western Atlantic R. Co. v. Henderson, 279 U. S. 639 (1929); Tot v. United States, 319 U. S. 463 (1943); *In re:* Allen, 82 Vermont, 365; Johnson v. State, 55 Md. 350; Gibson v. Pekanek, 25 So. Dak. 281; Larson v. Dickey, 39 Nebr. 386; Cairo & Fulton R. R. Co. v. Parks, 32 Ark. 131; McCready v. Sexton & Son, 29 Iowa, 356; South Cotton Oil Co. v. Raines, 121 Ga. 154; Missouri K. & T. Ry. Co. v. Simonson, 64 Kansas, 802.

We respectfully submit that where there is no sworn testimony, where no witness appears, where there is no opportunity for cross-examination, and to cap the climax where documents prepared by persons having no connection with the Bank, are held uncontradictable proof of their contents and constitute the only evidence of the fraud complained of against the Bank,

every safeguard inherent in due process is thrown to the winds. The denial of cross-examination, the elevation of hearsay evidence to legitimacy and the denial of the right to contradict the Bill versus the Directors was a denial of the "opportunity to be heard." Powell v. Alabama, 287 U. S. 45 (1932), at p. 68; Holden v. Hardy, 169 U. S. 366 (1898), at p. 389.

TWAY CANNOT DEFEAT THE NOTE ON THE BASIS OF ALLEGED ULTRA VIRES ACTION OF THE BANK IN WHICH HE KNOWINGLY PARTICIPATED.

Tway contends that the Bank should suffer the loss resulting from the impairment of value of the Banco stock, because it induced him to buy the stock and misrepresented the facts in doing so. He contends that the making of the loan was only one of the steps in a scheme to organize and finance Banco. He is relying on *ultra vires* acts of the Bank to sustain his defense. In the trial Court, Tway contended that *ultra vires* was no defense. This is true where the corporation raising the defense of *ultra vires* has gained a benefit. In such case, it is estopped without returning the benefit received, to set up the defense of *ultra vires*. Here, however, the National Bank of Kentucky did not benefit from making the loan to Tway. Its assets were not augmented. They were depleted when the $50,000.00 was withdrawn from its assets and paid over into BancoKentucky. The trial Court ruled that the defense of *ultra vires* was unavailable without regard to the question of whether a benefit was received or not

because Tway was asserting the defense of fraud. The Court charged the jury:

> "Something has been said * * * that since the Bank under its charter was not authorized to engage in the business of selling stocks of other corporations, that any transaction with respect to this Banco stock by the Bank would be *ultra vires* —that is, beyond its corporate powers—and that no officer of the Bank would be able to enter into any binding contract with respect to it and that, therefore, the representations with respect to the value of the stock, or the supporting stock, would be wholly immaterial. That is not the situation where deceit, fraud—either in affirmative misrepresentation or concealment—is relied upon. And whether the transaction was within its corporate powers or not within its corporate powers is immaterial if you find from the evidence that there were fraudulent misrepresentations or concealments relied upon by the defendant as inducing him to make the note and relied on in the contract" (R. 1216).

In the Appellate Court, Judge Simons recognized the error in this instruction. He considered this Court's rulings in Dietrick v. Greaney, 309 U. S. 190 and D'Oench, Duhme & Co., Inc. v. F. D. I. C., 315 U. S. 447, applicable if "Tway participated in a transaction which * * * he knew to be beyond the authority of the bank" (R. 1368). He interpreted the record as containing a denial on the part of Tway of such knowledge. This is disputed by the Receiver. Instead, the Receiver contends that Tway admitted such

knowledge. Tway copied in his answer the Prospectus on which he said he relied and which reveals that the Bank was going to engage in *ultra vires* action in organizing Banco. He related to the jury the statements Thieman made to him, to the effect that Banco, when organized by the Bank, would "do and perform functions that a national bank could not do" (R. 165) (See 1395-1397). However, conceding that there was a denial in the record, we are left with a difference of fact between the plaintiff and the defendant as to whether Tway "knew" or not. This, Judge Simons states, was a "question * * * for the jury" (R. 1368). However, the jury was foreclosed from considering this question when the Court instructed the jury that "whether the transaction was within its corporate powers or not within its corporate powers is immaterial if you find from the evidence that there were fraudulent representations or concealments" (R. 1216).

Judge Simons states that the majority of the Court "agree with all of the views herein expressed, except in respect to the admission of certain evidence (and) * * * they disagree also with the view that the newly discovered evidence" requires a new trial (R. 1359). Judge McAllister stated that he concurred with Judge Simons "except as therein noted" (R. 1371).

We must take it, therefore, that all three members of the Court were in agreement that this was a question that should have been submitted to the jury. Nevertheless, it was not so submitted.

TWAY CANNOT SHIFT THE LOSS, RESULTING FROM ACTS INDEPENDENT OF AND SUBSEQUENT TO THE ALLEGED MISREPRESENTATIONS, TO THE DEPOSITORS.

The assets of the National Bank of Kentucky were depleted when Tway, by his check, withdrew that much money and paid it into Banco for the stock which he bought. Conceding, for the sake of argument, that Tway has a claim against the Bank for inducing him to buy that stock, he cannot shift the loss to depositors in so far as the loss results from matters arising after he acquired the stock. Tway admits, in his petition, that one of the assets of Banco from the very start was the stock of the Louisville Trust Company and that this Bank had a valuation of $8,000,000.00 (R. 20). This, he testified, was one of the "cornerstones" of Banco (R. 338, 340, 347). The Louisville Trust Company was in sound financial condition (R. 810). Tway "had no complaint on account of the Louisville Trust Company" (R. 379). Banco concededly had other assets consisting of cash and its ownership in the Cincinnati Banks. After Tway bought his stock, Brown was elected President of Banco (R. 336). This was with the full approval of Mr. Tway. Brown borrowed $2,000,000.00 of Banco's money without knowledge of the directors of Banco. He used the money for his own purposes (R. 1038). $1,500,000.00 was lost by Banco on this transaction. The depositors of the National Bank of Kentucky should not be required to bear the burden of this loss resulting from Tway's mis-

placed confidence in selecting Brown as an officer of Banco. Banco lost almost $7,000,000.00 when it sold the Cincinnati Banks one year after Tway bought his stock. It lost millions as a result of the Caldwell deal, which was not initiated until six months after Tway bought his stock (R. 777).

Tway sought to shift the entire loss to the depositors, by setting up the claim of fraud as a defense. It is submitted that the case called for the application of Rule 8(c) of the Rules of Civil Procedure. Justice required that the pleading should have been treated as a counterclaim.

The Court of Appeals of Kentucky Has Held, in a Similar Situation, That There Was No Defense to the Note.

This Court was advised in the assessment suit that "some $9,900,000.00 in cash was realized by Banco from the sale of its shares—about $6,000,000.00 of which was financed on loans from the Bank and from the Trust Company" Anderson v. Abbott, *supra*.

Reference has already been made to the suits against other borrowers of money from the Bank and the fact that those cases have been held in abeyance pending final decision in the present suit. In one case, however, brought in the State Courts of Kentucky, there has been a final decision. Beck v. First National Bank of Charlestown, Indiana (1933), 250 Ky. 764, 63 S. W. 2d 937. The plaintiff Bank in that case recovered on two grounds. One of them was that there was no actionable fraud. The Court of Appeals of Ken-

tucky, after setting out the elements necessary to constitute actionable fraud stated:

> "The evidence leaves it exceedingly doubtful if the necessary elements 2 (that it was false) and 3 therein (that it was known to be false or made recklessly without any knowledge of its truth and as a positive assertion) or either of them, were proven. On the contrary, defendant's testimony, so far as it sought to establish them, clearly indicated that those interested in BancoKentucky in good faith believed that it was a sound financial institution and that the principles upon which it was organized and was being conducted would prove profitable to its stockholders. But, if it were otherwise as to element 2, then it is quite clear that element 3 was not proven, since Mr. Thiemann, with whom defendant conversed, and who was the sole officer of the National Bank of Kentucky whom she consulted, was enthusiastic over the prospects for the success of BancoKentucky, in which, we repeat, he had made a large individual investment."

The Mr. Thiemann referred to in the Beck case was the same Mr. Thieman upon whose word Mr. Tway relied. His good faith has been conceded in this case (R. 127, 352, 348).

CONCLUSION.

A very peculiar situation is revealed by the record in this case. Tway was named as defendant in two separate suits brought by the Receiver. One was the action for stock assessment resulting from his ownership of Banco stock and the other was on the note given to the Bank. In the stock assessment suit, Tway successfully maintained in this Court that:

> "Banco was organized in good faith and was not a sham; * * * It was not organized for a fraudulent purpose or to conceal enterprises conducted for the benefit of the Bank; * * * It was not a mere holding company; * * * It was not formed as a means of avoiding double liability on the stock of the Bank; and * * * the soundness of the Bank and its ability to meet the obligations could not be questioned until after the formation of Banco." Anderson v. Abbott, 321 U. S. 349.

In the stock assessment case, Tway obtained a finding that "Banco was formed for the purpose set out in the letter of July 19, 1929, and for no other purpose." (Finding of Fact No. 65, R. 1, p. 267, Anderson v. Abbott No. 3, October Term, 1943.) In the note case, Tway affirmatively alleged in his answer that the letter of July 19, 1929 "* * * does not set forth what was in truth and fact the reason why the Bank organized said Company (R. 16). * * * The BancoKentucky Company was organized by the Bank for the purpose of procuring this defendant and others to

subscribe for stock of the BancoKentucky Company to pay for same in cash, in order that the Bank, being in control of the said BancoKentucky Company, might take the funds of the BancoKentucky for worthless claims carried by the Bank amongst its assets" (R. 21).*

The allegation above set forth, which is diametrically opposed to the position taken by Tway in the assessment suit was repeated seven times in Tway's answer (R. 16, 20, 21, 25, 28, 29, 31). It is a statement introductory to twenty-three pages of the answer which set out alleged facts in support of the introduction. It was one of the matters submitted to the jury. The Court charged it:

> "One of the matters relied upon as a defense is that the organization of Banco in its inception was for the purpose and design and plan which contemplated the removal from the assets of the National Bank of Kentucky certain items that had been criticized by Bank Examiners and which have been specifically pointed out in the trial of this case as having been concealed from the defendant Tway" (R. 1216).

In the Court of Appeals, Tway contended "that he did not rely upon the allegation that Banco was organized for the purpose of removing bad assets from the Bank" (R. 1365). Judge Simons pointed out, however, that "that issue was, however, submitted to the jury and there can be no doubt that the evidence bear-

*The Receiver pleaded that Tway was estopped to take diametrically opposite positions in the two suits (R. 53) on the ground that a "fact once so determined as between the same parties or their privies, must be taken as conclusively established." (Southern Pacific R. R. v. U. S., 168 U. S. 1.)

ing thereon was prejudicial." The majority opinion does not refer to this phase of the case. It would seem that the waiver alone of reliance on a claim submitted to the jury—a point previously adjudicated in litigation between the same parties, in favor of the Receiver, would justify a new trial, so that the jury can consider the facts without being influenced, as they must, by a charge of this nature.

A further unique situation is presented by the nature of the opinion written in the Appellate Court. Judge Simons points out ~~three~~ seven separate errors in the action in the District Court proceedings. The majority opinion only gives its reasons for disagreement with Judge Simons as to one of those errors.

Judge Simons points out:

1. That Tway should not have been permitted to establish losses by Banco resulting from acts independent of the vice of which he complains and involving transactions entered into after he bought his stock. "Neither Thieman nor the Bank was a guarantor of the financial successes of the Banco venture and neither could be charged with knowledge of future events (R. 1364) * * * I arrive at the conclusion that the operations of Banco subsequent to Tway's purchase of its stock were inadmissible as evidence, and that such manipulations as were permitted to go to the jury, even though not now relied upon by Tway, were so prejudicial to the rights of the Receiver as to require a new trial" (R. 1365, 1366). The majority of the Court did not comment on this phase of the case.

2. "The Receiver should have been permitted * * * to demonstrate error in the allegations of his pleading" (R. 1364). There was no comment from the other judges.

3. That the hearsay statements contained in the Examiners' Report could not "be legitimized as evidence merely by including it in an official report" (R. 1365). The majority opinion did not comment on this matter.

4. That Tway could not eliminate prejudice by waiving in the Appellate Court his contention that Banco was organized for a wicked purpose. "Tway now contends that he did not rely upon the allegation that Banco was organized for the purpose of removing bad assets from the Bank. That issue was, however, submitted to the jury and there can be no doubt that the evidence bearing thereon was prejudicial * * *. Nor does Tway's present repudiation * * * cure the prejudice which Brown's washed sales and subterfuge must have created in the minds of the jury" (R. 1365). The majority opinion does not reply to this statement.

5. That Tway's participation in an *ultra vires* transaction was a defense if he "knew" that it was "beyond the authority of the Bank" (R. 1367-8). The majority of the Court did not disagree on this comment.

6. That the instruction, with relation to the Chicago brokers' subscription for 250,000 shares of Banco stock "would probably be avoided upon retrial (since) in view of the conceded good faith of Thieman it was erroneous

and clearly prejudicial * * * the jury should not have been allowed to consider the statement as an element in the alleged fraud" (R. 1369). The majority of the Court did not disagree with this statement, but, nevertheless, did not order a new trial, so that this "erroneous and clearly prejudicial" instruction could "be avoided upon retrial."

7. That the verdict was bottomed on testimony given by Tway in the trial below, which was "concededly untrue" (R. 1371) and that the jury should have a right to appraise Tway's credibility in the light of the newly discovered evidence for the reason that he was the sole witness on material factors in the case. The majority of the Court only commented on this phase of the case and accepted Tway's position that he had never "purchased the stock individually" (R. 1372).

It is agreed, therefore, by all judges that Tway's testimony in the trial that he owned the stock, was untrue, but, the other Judges nevertheless, refused to join in with Judge Simons in directing a new trial.

It is submitted that the proceedings below represent a departure from the accepted and usual course of judicial proceedings and call for the exercise by this Court of its powers of supervision.

Respectfully submitted,

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